

Consolidated Freightways, Inc. and Robert Mennicucci

Local 478, International Brotherhood of Teamsters, AFL-CIO¹ and Robert Mennicucci. Cases 22-CA-17085 and 22-CB-6499

May 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 13, 1991, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondents each filed an answering brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The name of the Respondent Union has been changed to reflect the new official name of the International Union.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts to the judge's failure to discuss the testimony of Ian David Kass. Even considering Kass' testimony concerning the South Brunswick terminal, we agree with the judge that the General Counsel has failed to show by a preponderance of the evidence that the Respondent Union caused, or attempted to cause, the Respondent Employer to deny permanent employment to Mennicucci.

Dorothy C. Karlebach, Esq., for the General Counsel.
Martin J. Brenner, Esq. (Brenner & Brenner), of Livingston, New Jersey, for the Respondent Employer.
Joseph S. Fine, Esq. (Reitman, Parsonnet & Duggan), of Newark, New Jersey, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on January 14, 15, 18, and 22, 1991. Upon charges filed on June 20, 1990, a complaint was issued on September 28, alleging that Con-

solidated Freightways, Inc. (Respondent Employer or Consolidated) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and that Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Respondent Union or Local 478) violated Section 8(b)(1)(A) and (2) of the Act. Both Respondents filed answers denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by all the parties on May 28, 30, and 31, 1991, respectively.

On the entire record of the case,² including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Consolidated Freightways, Inc., a corporation with offices and places of business in Somerville and South Brunswick, New Jersey, has been engaged in the interstate and intrastate transportation of freight. It annually derives revenues in excess of \$50,000 for the transportation of freight from the State of New Jersey to points located outside New Jersey. Consolidated admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The issues are:

1. Did Local 478 cause, or attempt to cause, Consolidated to deny permanent employment to Robert Mennicucci, in violation of the Act?

2. Did Consolidated deny permanent employment to Mennicucci, in violation of the Act?

B. The Facts

1. Background

On March 7, 1990, Robert Mennicucci, a truckdriver, went to work as a casual employee for Consolidated's recently opened South Brunswick terminal. As a casual employee he was not on the seniority list. Mennicucci testified that during the week of Good Friday he received pay for only 4 days. He discussed the matter with William Berkery, the shop steward, who showed him the applicable portion of the collective-bargaining agreement which provided that casual employees would be entitled to holiday pay only if they worked on the holiday.

Mennicucci testified that on March 13, soon after he began working at the South Brunswick terminal, he met Francis Prainito, president of Local 478, and told him that he would like to switch his book from Local 641 to Local 478. Mennicucci testified that Prainito told him "I have to check with Sonny Musso . . . and get the okay from him." Mennicucci also testified that later in the day Berkery told

¹ All dates refer to 1990 unless otherwise specified.

² General Counsel's motion to correct transcript is granted.

him that he spoke to Prainito and "he had gotten the okay to continue working me, as long as I didn't . . . badmouth Sonny Musso or discuss in any way the upcoming election in Local 641."

Memorial Day fell out on Monday, May 28. Mennicucci testified that on May 24, Berkery told the casuals "I'm going to teach [Consolidated] a lesson, I'm going to make them pay you the holiday. And the only way to do that is by making them hurt. I don't want none of you casuals in here, the day before the holiday or the day after the holiday." Mennicucci testified that he ignored Berkery's instructions and reported for work on May 25. Mennicucci testified that Berkery told him "I run this job and I told you not to come in here, we're going to see if you're going to keep working here."

On Tuesday, May 29, Mennicucci again appeared for work. He testified that Berkery said to him "what are you doing here? I told you not to come in." Mennicucci testified that Berkery told him "you're going to be off this job, that I guarantee you. When [Prainito] finds out, you're going to be off this . . . job." Mennicucci testified that earlier that morning he handed out election literature with respect to another local, Local 641, supporting Lonnie Bedell for president and opposing Sonny Musso. Musso was secretary-treasurer of Joint Council 73 and Mennicucci had filed charges against Musso in May 1989. Counsel stipulated that Local 478 was a member of Joint Council 73.

2. Failure to be placed on seniority list

Mennicucci testified that on May 29 he had a conversation with Thomas Conboy, the South Brunswick terminal manager. He testified that Conboy told him that he would be put on the seniority list, subject to taking a drug test. However, he was not put on the seniority list. He testified that on June 7 the dispatcher told him that "Conboy said there's something in your background, that we can no longer work you any more." Mennicucci testified that he then asked Conboy why he could not be hired and Conboy told him, "Bob, I was told you were passing out election literature" and "you were involved in a suit, the last company you worked for, you sued a company."

3. Testimony of Prainito and Berkery

Prainito has been the president of Local 478 since January 1990. He testified that he met Mennicucci in March at the South Brunswick facility and gave him an application to switch to Local 478. He testified that he did not mention Musso to Mennicucci, that he did not know that Mennicucci belonged to Local 641, and that Mennicucci did not fill out the application. Prainito testified that in May or June Mennicucci came to the union hall and asked him to investigate why Consolidated "wouldn't work him." Prainito asked Conboy to investigate the matter. Conboy told Prainito that the Company was doing a background check on Mennicucci and on another driver. Several days later Prainito went to see Conboy at which time Conboy told him that a supervisor at Mennicucci's former place of employment did not recommend him. Prainito denied that he had any discussion with Mennicucci concerning Musso. Prainito also testified that Musso is not his boss, that Musso played no role

in Prainito's election and that Musso plays no role in the affairs of Local 478.

Berkery has been shop steward at the South Brunswick facility since April 1990. He denied that he discussed Musso or Local 641 with Mennicucci. He also denied that he instructed employees not to show up for work in the days surrounding the 1990 Memorial Day weekend. He testified that when Conboy questioned him concerning the alleged job action Conboy did not identify Mennicucci as the person who complained and he did not think that it was Mennicucci who was the one who complained. He further testified that on May 25 a number of the casuals showed up and on May 29 four to five of the casuals reported for work.

4. Testimony of Sides and Conboy

Michael Sides, who appeared to me to be a credible witness, was an employee at the South Brunswick facility and had previously been operations manager at Spector Freight, where Mennicucci had been a driver. Sides credibly testified that on June 10 Conboy asked him whether he would recommend Mennicucci because the company was thinking of putting Mennicucci "on the list for full time." Sides credibly testified that he told Conboy that he would not recommend Mennicucci to be hired because he felt that he had "abused company policy" in his prior employment.

Thomas Conboy had been terminal manager at the South Brunswick facility since May 7, 1990. He testified that the terminal was closed on May 28, Memorial Day. On Tuesday, May 29, three or four casual employees were scheduled to work. One of them, Tom Doyle, did not report for work because he was ill. One of the others, Matthew Murphy, also did not appear for work, but he was given permission several weeks earlier. Conboy testified that it was reported to him that Berkery had told the casuals not to show up. On June 1 Conboy asked Mennicucci if the allegation concerning Berkery was true. Mennicucci said that it was. On the same day a meeting was held between Conboy, Berkery and Dennis Farley, the division manager. Berkery denied the allegation that he instructed the casuals not to report for work. At that time Farley told Conboy that he should start processing Mennicucci to become a full-time employee because he was a person who was a "stand-up guy" and "a company minded person and these were the type of people that we were looking to put on our seniority list." Conboy testified that he undertook an investigation and no one would come forward to testify against Berkery.

5. Investigation of Mennicucci's prior work performance

Conboy testified that during the week of June 4 he spoke to Mark Oty, a terminal manager, concerning Mennicucci's work performance at the Somerville terminal. Oty told Conboy that Mennicucci's work was acceptable except for one afternoon when he was involved in a "theft of time." On June 11 or 12 Conboy discussed Mennicucci with Sides. Sides told Conboy that "if it was up to him he would not consider [Mennicucci] for our seniority list" because Mennicucci "abused company time when he was at Spector." Conboy then discussed the matter with Farley and told Farley "I didn't feel right about the situation and [Farley] also felt the same way." Conboy testified that because

of Mennicucci's two past problems Farley told him "let's not go with it, I don't want to put him on." Conboy then went to his dispatcher, Harry Hutchison, and told him that as of the next day, "we would not be using Mr. Mennicucci any longer."

6. Testimony of Farley and Hutchison

Dennis Farley, Consolidated's division manager, appeared to me to be a credible witness. He testified that on May 30 he spoke to Conboy concerning the fact that not all the deliveries were made on the previous day. Conboy told him that he did not have enough people working and that there was a possible work stoppage by Berkery. Farley testified that on June 1 he had a meeting with Conboy and Berkery concerning the allegation of an alleged work stoppage by Berkery. Farley credibly testified that he did not identify Mennicucci as the person who complained. Farley then told Conboy to "do a background on Mr. Mennicucci and prepare to put him on the list." He stated that his reason was because "I thought that Mr. Mennicucci's concern seemed to be with the company's best interest at heart. With that kind of an attitude I would want a man like that on my list, I wanted him working for me." Farley credibly testified that within the next week Conboy advised him that there were two instances in Mennicucci's prior employment which were problematic. Farley stated that he concurred that we should "discontinue using Mr. Mennicucci and not consider him for our list." Farley also testified that the Union plays no role in determining whether the company puts a particular individual on the permanent list and, concerning the alleged work stoppage, only two employees did not report for work, one of whom received permission 2 weeks in advance and one who was out sick.

Hutchison corroborated the testimony of Farley and Conboy. He testified that on June 12 Conboy told him not to work Mennicucci anymore because "his background did not check out." Hutchison testified that the following day Mennicucci called to see if work was available and he told Mennicucci that "I was instructed not to work him anymore." He denied that he told Mennicucci "I never thought the Union had that power."

C. Discussion and Conclusions

The complaint alleges that on June 11 the Union caused, or attempted to cause, Consolidated to deny permanent employment to Mennicucci. General Counsel contends that the Union took this action because of Mennicucci's reporting of Berkery for the alleged work stoppage and because Mennicucci distributed literature supporting a candidate who was running against Musso for the presidency of another local. The complaint further alleges that pursuant to the Union's action Consolidated denied permanent employment to Mennicucci, in violation of the Act.

Mennicucci testified that Berkery instructed him not to "badmouth" Musso. Mennicucci also testified that after Memorial Day Berkery told him "you're going to be off this job" when Prainito "finds out." Prainito testified that he never mentioned Musso to Mennicucci. In addition, Prainito

testified that he did not discuss Musso with Berkery. Similarly, Berkery testified that he did not discuss Musso or Local 641 with Mennicucci. In addition, Hutchison denied making the statement that "I never thought the Union had this power." There has been no corroboration of Mennicucci's statements. I find that General Counsel has not shown by a preponderance of the evidence that the Union caused, or attempted to cause, Consolidated to deny permanent employment to Mennicucci.

With respect to the alleged work stoppage, the fact that Mennicucci complained about Berkery's alleged role was cause for Consolidated to look favorably on Mennicucci, not the opposite. Thus, Farley told Conboy to prepare to put Mennicucci on the permanent list. Farley reasoned that "with that kind of an attitude I would want a man like that . . . working for me." I have credited the testimony of Sides, Conboy and Farley that Consolidated investigated Mennicucci's background with the view of placing him on the permanent list but when they found that there had been two problems in his former employment they decided against continuing him as an employee. Finally, with respect to General Counsel's contention that the Union sought to take action against Mennicucci because he supported a candidate who was running against Musso for the presidency of another local, General Counsel has failed to show by a preponderance of the evidence that such conduct took place. Prainito denied that he mentioned Musso in a conversation with Mennicucci. Berkery denied that he discussed Musso or Local 641 with Mennicucci and Hutchison denied that he made the statement "I never thought the Union had this power." In addition, no showing has been made that Musso controls or plays any role in the affairs of Local 478. Accordingly, I find that General Counsel has not shown by a preponderance of the evidence that the Union caused, or attempted to cause, Consolidated to deny permanent employment to Mennicucci and that Consolidated denied permanent employment to Mennicucci pursuant to the Union's actions.

CONCLUSIONS OF LAW

1. Consolidated Freightways, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 478 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.